No. 383

In the Supreme Court of the United States

OCTOBER TERM, 1955

GENERAL BOX COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR THE STATE OF LOUISIANA AS AMICUS CURIAE

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The State of Louisiana, through its Attorney General, respectfully submits this brief as amicus curiae, acting pursuant to Rule 42 of the Rules of this Honorable Court.

OPINIONS BELOW

1. Opinion of the Court of Appeals and dissenting opinions (R. 262-284); reported, 224 F. 2d 7.

2. Opinion of the District Court denying motion of the United States to dismiss (R. 30-33); reported, 94 F. Supp. 441.

3. District Court's opinion on first trial (R. 229-242); reported, 107 F. Supp. 981.

4. District Court's opinion following new trial (R. 246-255); reported, 119 F. Supp. 749.

JURISDICTION

Federal Jurisdiction was invoked under 28 U.S.C. 1346. The judgment of the Court of Appeals was entered on June 17, 1955 (R. 285). The petition for rehearing was denied on August 5, 1955 (R. 291). The petition for a writ of certiorari was filed on September 12, 1955, and the same was granted on November 7, 1955 (R. 291). The jurisdiction of this court has been invoked pursuant to 28 U.S.C. 1254 (1).

QUESTION PRESENTED

The interest of the State of Louisiana in this case is restricted to the sole question of whether or not Section 6, Article XVI of the Louisiana Constitution of 1921 provides the only compensation payable for lands and improvements thereon used or destroyed for levees or levee drainage purposes in the State of Louisiana.

STATUTES INVOLVED

The relevant and applicable provisions of the Flood Control Act of May 15, 1928, as amended, 33 U.S.C., Secs. 702 a (12), 702 b, and 702 c. Act 188 of 1904 of the Louisiana Legislature. Articles 455 and 665 of the Louisiana Revised Civil Code.

Sections 5 and 6, Article XVI of the Louisiana Constitution of 1921.

STATEMENT

Petitioner, General Box Company, instituted two suits in the United States District Court for the Western District of Louisiana, seeking under the Tucker Act, 28 U.S.C., Sec. 1346, to recover damage for the value of timber removed from or destroyed on two tracts of land by contractors of the United States in enlarging a levee on the Mississippi River in Louisiana. The two cases were consolidated for purpose of trial.

The enlargement project was undertaken under the provisions of the Flood Control Act of May 15, 1928, 45 Stat. 534, as amended, which in part provides for the acquisition of rights-of-way for levee construction along the Mississippi River, without cost to the United States.

Acting pursuant to Section 5, Article XVI of the Louisiana Constitution of 1921, as amended, authorizing Levee Boards to cooperate with the United States in levee construction or enlargement projects, the Board of Commissioners of the Fifth Louisiana Levee District granted the necessary rights-of-way, requested by the United States, following approval of the plans by the Louisiana Department of Public Works. (See R. 295, 296, 221, 223, 296, 297 and 298).

Private contractors under employ by the United States began clearing the land and removing or

destroying timber on the rights-of-way. Petitioner, General Box Company, then filed suits to recover the value of the timber (R. 3,48). The Levee Board was brought into court under third-party complaints (R. 33,56). The United States moved to dismiss petitioner's complaint but such motion was denied (R. 27,30,54; 94 F. Supp. 441).

Section 6, Article XVI of the Louisiana Constitution of 1921, as amended, reads in part as follows:

> "Land and improvements thereon hereafter actually used or destroyed for levees or levee drainage purposes, and for acquiring property within the limits of any duly incorporated municipality of one hundred thousand population or over to be used for constructing new streets or highways where it was necessary to take a previously existing street or highway for levees or levee drainage purposes, shall be paid for at a price not to exceed the assessed value of the preceding year; provided, that this shall not apply to batture, nor to property the control of which is vested in the State or any subdivision thereof for the purpose of commerce; and provided further, that streets and highways within the limits of any duly incorporated municipality of one hundred thousand population or over shall be restored by the governing authorities of the levee district upon the new location so acquired in order to replace any street or highway actually used or destroyed for levees or levee

drainage purposes, and such street or highway shall be of a similar type or character as that of the street or highway used or destroyed."

The United States and the Levee Board contended that the foregoing provisions of the Louisiana Constitution provided the exclusive means and method under Louisiana law to compensate for lands and improvements thereon used or destroyed for levees or levee drainage purposes, and that no recovery could be had for removal or destruction of the value of the timber except as restrictively contemplated by the constitutional provisions aforesaid.

The District Court held that the United States was liable in civil trespass but that no restitution could be demanded by the United States against the Levee Board. The court dismissed the suits as to the Levee Board and awarded General Box Company judgment for $10,801.00 against the United States.

On appeal to the Court of Appeals, Fifth Circuit, with one judge dissenting, the judgment of the lower court was reversed and directions were given to enter judgment for the United States. In effect, the Court of Appeals held that the timber was subject to the servitude of use (Section 6, Article XVI, Louisiana Constitution) and that the servitude was properly exercised by the Levee Board and the United States.

SUMMARY OF ARGUMENT

1. Article XVI, Section 6, Louisiana Constitution of 1921 provides the only compensation under Louisiana law for the exercise of the public servitude therein expressly mentioned.

2. The exercise of such servitude is an APPROPRIATION, no hearing, notice or prescribed procedure being necessary.

3. The servitude extends over all lands, improvements, growing crops, and standing timber, within such distance from the river and its banks as is reasonably necessary to cope with the physical situation and forces of nature.

4. Articles 455 and 665 of the Louisiana Revised Civil Code are the sources of the servitude, the exercise of which is contemplated by Article XVI, Section 6 of the Louisiana Constitution of 1921, and that prior to 1921 no compensation whatever was provided by Louisiana law for the use of said servitude.

5. Lands and improvements thereon used or destroyed for levees or levee drainage purposes can only be subject to compensation if assessed for taxation the year previous to the exercise of such servitude.

ARGUMENT

1.

Article XVI, Section 6, Louisiana Constitution of 1921 provides the only compensation under

Louisiana law for the exercise of the public servitude therein expressly mentioned.

Article 455 of the Louisiana Revised Civil Code reads as follows, to-wit:

> "The use of the banks of navigable rivers or streams is public; accordingly every one has a right freely to bring his vessels to land there, to make fast the same to the trees which are there planted, to unload his vessels, to deposit his goods, to dry his nets, and the like.
>
> Nevertheless the ownership of the river banks belongs to those who possess the adjacent lands."

Article 665 of the Louisiana Revised Civil Code reads as follows, to-wit:

> "Servitudes imposed for the public or common utility, relate to the space which is to be left for the public use by the adjacent proprietors on the shores of navigable rivers, and for the making and repairing of levees, roads and other public or common works.
>
> All that relates to this kind of servitude is determined by laws or particular regulations."

In *Wolfe* v. *Hurley*, 46 F. 2d 515, 520 (1930), affirmed 283 U.S. 801, the court held in part:

> "From ancient times, and until quite recently, in Louisiana, the civil law has required the owner of property bordering upon a navigable stream to give, without compensation, so much thereof as might be needed for the construction of levees and highways. Civ.

Code La. Art. 655; Code Napoleon, Art. 650; *Dubose* v. *Levee Commissioners*, 11 La. Ann. 167; *Bass* v. *State of Louisiana*, 34 La. Ann. 494, and authorities cited therein; *Pontchartrain Railroad* v. *Board of Levee Commissioners*, 49 La. Ann. 570, 21 So. 765 . . ."

". . . Property bordering upon navigable streams throughout the rest of the state continued to bear the burden of this servitude without compensation, until 1921, when Section 6 of Article 16 was placed in the constition. . . ."

* * * *

". . . For this reason, in so far as the taking of any lands which could have been demanded before the change is concerned, we see nothing in the Fourteenth Amendment that affects the provisions of Section 6 of Article 16 of the constitution of 1921. In other words, being in legal contemplation of gratuity, its extent was subject to the will of the lawmakers fixing the assessed value as the maximum price to be paid for lands used for levee purposes. . . ."

* * * *

"We conclude that the servitude contemplated by article 665, which, as above stated, is based upon immemorial principles, applies, not only to property which actually adjoins the river's edge, but to all of that which is within range of the reasonable necessities of the situation, as produced by the forces of nature, unaided by artificial causes."

See also *Peart* v. *Meeker*, 45 La. Ann. 421, 12 So. 490; *Mayer* v. *Board of Com'rs. for Caddo Levee District*, 117 La. 1119, 150 So. 295 (1933).

In recognition of this firmly established principle in Louisiana law and jurisprudence, it was enunciated in *Eldridge* v. *Trezevant*, 160 U.S. 452, and in *Mayor of Vidalia* v. *McNeely*, 274 U.S. 676, that property adjoining or abutting a navigable stream never passes free of the reservation of such servitude into the hands of a purchaser and that the purchaser takes title "knowingly" or with full knowledge of the existing servitude. *Mayer* v. *Board of Com'rs. for Caddo Levee District, supra*, refers to the grant of the servitude as a "gratuity", and holds that the servitude was a right belonging to the state when the constitution was adopted.

Petitioner cannot deny what the Louisiana Constitution provides or that such means of compensating for an erstwhile gratuity has been exclusively followed in Louisiana since 1921. Petitioner cannot successfully attack the constitutionality of Article XVI, Section 6 of the Louisiana Constitution of 1921 as being repugnant to the Federal Constitution, for the constitutionality of such provisions in the substantive law of Louisiana was effectively upheld in *Eldridge* v. *Trezevant*, supra; *Board of Com'rs. of Tensas Basin Levee District* v. *Franklin*, 219 La. 859, 54 So. 2d 125, appeal

dismissed 342 U.S. 844, rehearing denied 342 U.S. 889.

Petitioner appears to take the position that the removal or destruction of growing timber must be dealt with separately in determining compensation due the owner of such timber, viewing the removal or destruction of same as a civil trespass which is not governed by La. Const. Art. XVI, Sec. 6. No such distinction ever appears to have been drawn in our jurisprudence.

True, timber may be assessed apart from the land, if separately owned, but Article XVI, Section 6 of the Louisiana Constitution expressly refers to "lands and improvements thereon." If the timber is owned by and assessed to one person and the land is owned by and assessed to another, compensation would be due each, based on the separate assessments.

But it is rejugnant to and inconsistent with the Louisiana Constitutional provisions here analyzed to deal with lands and improvements thereon separately, whereby the assessed value of the former would be the criterion of restitution and an award for civil damages in a tort action the measure of compensation for the latter.

Article 465 of the Louisiana Revised Civil Code reads in part as follows:

> "Standing crops and the fruits of trees not gathered, and trees before they are cut down, are likewise immovable, and are considered

as part of the land to which they are attached. . . ."

The same code article treats of trees that are felled or cut down as movables, but Article XVI, Section 6 of the Louisiana Constitution of 1921 deals with IMPROVEMENTS, as well as lands, and makes no distinction between values of growing crops or trees and of crops or trees that are gathered and removed.

As enunciated in *Lacour* v. *Red River, Atchafalaya and Bayou Boeuf Levee District*, 158 La. 737, 104 So. 636, under La. Const. Art. XVI, Section 6, relating to payment for property used or destroyed for levee purposes, no recovery can be had for destruction of growing crops. Since Article 465 of the Louisiana Revised Civil Code places growing crops and trees before they are cut down in the same property category, then no recovery could be had for the destruction of growing timber.

2.

The exercise of such servitude is an appropriation, no hearing, notice, or prescribed procedure being necessary.

Petitioner belabors the point, and treats it as essential, that certain prescribed procedure, i.e.; notice and hearing, be followed in pursuing Article XVI, Section 6 of the Louisiana Constitution (Br. pp. 13-20). This contention is not supported by Louisiana jurisprudence. Since the state owns the

servitude, it may exercise it at will, and need only determine compensation due on the basis of readily available tax rolls. Notice and hearing could only be a superfluous undertaking. In *Board of Com'rs.* v. *Trouville*, 212 La. 152, 31 So. 2d 7 (1947), the court held that no notice of exercising the servitude was necessary, and in *Danziger* v. *United States*, 93 F. Supp. 70, it was held that no formal procedure was essential in pursuing the appropriation.

Petitioner appears to view the exercise of the servitude as an expropriation. It is an APPROPRIATION. *Danziger* v. *United States, Supra; Board of Com'rs.* v. *Trouville, Supra.*

The nature of the action is explained in *Wilson* v. *Aetna Insurance Company;* La. App. 1935, 161 So. 650, and in *Wilson* v. *Royal Insurance Company*, La. App. 1935, 161 So. 653:

> "The taking of reparian land for levee purposes is the 'exercise of a servitude' or an '*appropriation for public use*', though not an *expropriation*, and leaves only the naked title in the owner to whom right to use the land will revert in case it should no longer be needed for levee purposes." (Emphasis supplied).

To exercise an existing servitude is not to expropriate in the field of eminent domain. And, as held in many cases, including *Hart* v. *Board of Levee Com'rs.*, 54 Fed. 599; *Peart* v. *Meeker*,

supra, and *Board of Com'rs. of Tensas Basin Levee District* v. *Franklin*, supra, the procedure required for due process does not apply to the exercise of a servitude for levee purposes.

3.

The servitude extends over all lands, improvements, growing crops, and standing timber, within such distance from the River and its banks as is reasonably necessary to cope with the physical situation and forces of nature.

In the important case of *Wolfe* v. *Hurley*, supra, now approaching landmark significance, the court said (46 Fed. 2d 515, at page 522):

> "We conclude that the servitude contemplated by Article 665, which, as above stated, is based upon immemorial principles, applies, not only to property which actually adjoins the river's edge, but to all of that which is within range of the reasonable necessities of the situation, as produced by the forces of nature, unaided by artificial causes."

The same principle, in effect, was enunciated in *Pruyn* v. *Nelson*, 180 La. 760, 157 So. 585 (1934):

> "This servitude is limited only by the reasonableness of its use, and the administrative officers of the State of Louisiana are charged with determining that limit, subject to review by the Courts only when oppression or injustice is shown and proved."

Petitioner points out no oppression or injustice. The need of removing the timber is not denied. Complaint is chiefly made in regard to lack of notice and hearing. To say that the removal or destruction of timber was oppressive in this case is only to state that the exercise of the servitude in a constitutional manner worked injustice on petitioner.

4.

Articles 455 and 665 of the Louisiana Revised Civil Code are the sources of the servitude, the exercise of which is contemplated by Article XVI, Section 6 of the Louisiana Constitution of 1921, and that prior to 1921 no compensation whatever was provided by Louisiana law for the use of said servitude.

In *Wolfe* v. *Hurley*, Supra, the court referred to La. Civil Code Art. 665 as reflecting the Louisiana Law, based on Code Napoleon Art. 665, as requiring the owner of property bordering upon a navigable stream to give, without compensation, so much thereof as might be needed for the construction of levees and highways; then the court, noting the exception made in regard to appropriations by the Orleans Levee Board, said:

> "Thereafter, property bordering upon navigable streams throughout the rest of the State continued to bear the burden of this serviude without compensation, until 1921,

when Section 6 of Article 16 was placed in the constitution."

Again referring to Articles 455 and 665 of the Louisiana Revised Civil Code, the court said in *Dickson* v. *Board of Com'rs. of Caddo Levee* District, 210 La. 121, 26 So. 2d 474:

> "Prior to the adoption of Const. 1921, property used for construction and drainage of levees other than property in district under control of Orleans Levee Board, was not paid for, notwithstanding constitutional guaranty that one cannot be deprived of his property except for public purposes and after adequate indemnification, since a servitude was imposed upon all lands bordering on navigable rivers and streams for the construction and maintenance of levees, roads and other common or public works."

It is clearly, therefore, to be seen that the people of Louisiana, in adopting the 1921 Constitution, did not destroy Articles 455 and 665 of the Louisiana Revised Civil Code but only lifted the exercise of the servitude from a mere gratuity to compensation based on assessed valuation of property used or destroyed for levee purposes.

5.

Lands or improvements thereon used or destroyed for levees or levee drainage purposes can only be subject to compensation if assessed for taxation the year previous to the exercise of such servitude.

Counsel for the State of Louisiana have not seen the transcript of evidence in this case and they are uninformed concerning the assessment vel non of the timber for taxation for the year preceding the removal or destruction of the timber. If, however, as counsel are informed, petitioner, General Box Company, owned the timber apart from the fee of the lands on which it was grown, it appears clear and certain that the timber would have had to be assessed for the year preceding the exercise of the servitude, if the provisions of Const. Art. XVI, Sec. 6 are to be applied. In the absence of such assessed valuation, no basis for compensation is provided. And if the timber was not assessed for that year, petitioner cannot resort to an action for civil trespass in the alternative, only to undertake destruction of the legal principles, long settled in Louisiana Law, as to the right of the state to exercise a servitude on lands bordering upon a navigable river or stream for levee purposes, free from an action for damages.

The assessed value of land taken for levee purposes is conclusive on owners as to actual value. *Green* v. *Board of Com'rs. of Lake Borgne Basin Levee District*, 163 La. 117, 111 So. 619, (1927). Compensation for property used or destroyed for levee purposes cannot be recovered, if property was not assessed for taxes in last year before use or destruction thereof. *Lacour* v. *Red River Atcha-*

Atchafalaya and Bayou Boeuf Levee District, 158 La. 737, 104 So. 636 (1925).

In the *Lacour* case, last above cited, the court directed its attention to the following question: "Is it necessary for the plaintiff to allege, in a suit for compensation for the loss of property used or destroyed for levee purposes, that the property was assessed for taxes in the preceding year." The court answered that question to say, "yes; it is necessary for the plaintiff, in a suit for compensation for property used or destroyed for levee purposes, to allege that the property was assessed for taxes in the preceding year, and to allege what the amount of the assessment was, for that is all that the plaintiff could have an action for. When a right of action depends for its existence upon a statutory or constitutional grant, it cannot extend beyond the terms of the grant."

CONCLUSION

For the reasons above set forth, the judgment of the Court of Appeals should be affirmed.

March, 1955

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